

Agency Name: Office of Regulatory Staff

Statutory Authority: 58-27-2620, 58-27-2630, 58-27-2640, and 58-27-2660

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Subject: Consumer Protection for the Lease of Renewable Energy Generation Facilities

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Document No. 4960
OFFICE OF REGULATORY STAFF
CHAPTER 111

Statutory Authority: 1976 Code Sections 58-27-2620, 58-27-2630, 58-27-2640, and 58-27-2660

111-10 through 111-66. Lessors of Renewable Energy Facilities. (New)

Preamble:

The Office of Regulatory Staff proposes to add Chapter 111 to provide a consumer protection framework applicable to the lease of renewable energy generation facilities. South Carolina Code Section 58-27-2660(A)(1) provides that the Department of Consumer Affairs and the Office of Regulatory Staff develop such consumer protection regulations, which shall, at a minimum, include appropriate disclosures to be made by sellers and lessors.

Section-by-Section Discussion:

111-10 through 111-66. Adding new solar leasing regulations.

Notice of Drafting was published in the *State Register* on December 27, 2019.

Notice of Public Hearing and Opportunity for Public Comment:

Interested persons are invited to submit their views in writing to Andrew M. Bateman, General Counsel, South Carolina Office of Regulatory Staff, 1401 Main Street, Suite 900, Columbia, South Carolina 29201. To be considered, comments must be received no later than 5 p.m. on Monday, March 30, 2020, the close of the comment period. Should a public hearing be requested, the hearing will be held at the Administrative Law Court on April 7, 2020 at 10:00 AM.

Preliminary Fiscal Impact Statement:

Staff time will need to be expended in the enforcement process. However, a finite amount is undetermined due to uncertainty in estimating the number of matters that might warrant intervention and the extent to which any litigation will ensue.

Statement of Need and Reasonableness:

DESCRIPTION OF REGULATION: Solar Leasing Consumer Protections.

Purpose: The purpose is to develop consumer protection regulations pursuant to South Carolina Code Section 58-27-2660(A)(1).

Legal Authority: 1976 Code Sections 58-27-2620, 58-27-2630, 58-27-2640, and 58-27-2660.

Plan for Implementation: The revised regulations will take effect upon approval by the General Assembly and upon publication in the State Register. ORS will post the regulations on the agency's web site.

DETERMINATION OF NEED AND REASONABLENESS OF THE PROPOSED REGULATION
BASED ON ALL FACTORS HEREIN AND EXPECTED BENEFITS:

The Office of Regulatory Staff proposes to promulgate Chapter 111 to provide a consumer protection framework applicable to the lease of renewable energy generation facilities. These are necessary regulations to govern the practices of lessors in order to protect consumers, while ensuring due process when lessors are aggrieved by decisions made by the Office of Regulatory Staff.

DETERMINATION OF COSTS AND BENEFITS:

Staff time will need to be expended in the enforcement process. However, a finite amount is undetermined due to uncertainty in estimating the number of matters that might warrant intervention and the extent to which any litigation will ensue.

UNCERTAINTIES OF ESTIMATES:

None.

EFFECT ON ENVIRONMENT AND PUBLIC HEALTH:

None.

DETRIMENTAL EFFECT ON THE ENVIRONMENT AND PUBLIC HEALTH IF THE REGULATION IS NOT IMPLEMENTED:

None.

Statement of Rationale:

The creation of these regulations was mandated by South Carolina Code Section 58-27-2660 in order to govern the practices of lessors of renewable energy generation facilities and protect consumers.

~~Indicates Matter Stricken~~

Indicates New Matter

Text:

CHAPTER 111

OFFICE OF REGULATORY STAFF

Statutory Authority: 1976 Code Sections 58-27-2620, 58-27-2630, 58-27-2640, and 58-27-2660

ARTICLE 1

LESSORS OF RENEWABLE ENERGY FACILITIES

SUBARTICLE 1

GENERAL PROVISIONS

Reg.

111-10. Authorization of Rules.

111-11. Application of Rules.

111-12. Severability.

111-13. Definitions.

111-10. Authorization of Rules.

A. Section 58-27-2660, Code of Laws of South Carolina, 2019, provides:

1. “The Office of Regulatory Staff and the Department of Consumer Affairs are directed to develop consumer protection regulations regarding the sale or lease of renewable energy generation facilities pursuant to the distributed energy resource program in Chapter 40 of this title. These regulations shall provide for the appropriate disclosure provided by sellers and lessors. Sellers must comply with Title 37. Nothing herein alters existing protections afforded by Title 37.”; and

2. “The Office of Regulatory Staff is authorized to enforce any applicable consumer protection provision set forth in this title.”

B. In accordance with the above provisions, and pursuant to South Carolina Code Sections 58-27-2620, 58-27-2630, 58-27-2640, ORS has adopted the following rules and regulations.

111-11. Application of Rules.

A. Jurisdiction. These rules shall apply to any person, firm, partnership, association, establishment or corporation (except any other exempt by South Carolina statutes), which is now or may hereafter become engaged as a Lessor of a renewable energy facility within the State of South Carolina pursuant to Title 58, Article 23 except where specifically exempt by statute.

B. Purpose. The rules are intended to define good practice. They are intended to insure adequate and reasonable consumer protections. The Lessor shall assist ORS in the implementation of these rules and regulations.

111-12. Severability.

If any provision, or the application of any provision, of this Article is determined to be invalid, null, or void, such determination shall not affect or invalidate any other provision, or the application of any other provision, of this Article, and to this end, the provisions or the application of any of the provisions of this Article shall be deemed severable.

111-13. Definitions.

The following words and terms, when used in these rules and regulations, shall have the meaning indicated below.

A. Customer. “Customer” means the person who is named on the retail electric provider’s bill for the premises.

B. Lease Agreement. “Lease Agreement” means an agreement between a Customer and Lessor for the exclusive rights to use a renewable energy facility for a specified period of time in exchange for payment.

C. Lessee. “Lessee” means a customer subject to a Lease Agreement with a Lessor for the use of a renewable energy facility.

D. Lessor. “Lessor” means an entity that owns a renewable energy facility subject to any Lease Agreement.

E. Certificate. “Certificate” means the certificate of fit, willing, and able authorized to be issued under provisions of Title 58, Chapter 27, Article 23. Certificates shall be required of all entities operating as Lessors of renewable energy facilities within the State of South Carolina.

F. ORS. “ORS” means the South Carolina Office of Regulatory Staff.

G. Renewable energy facility. “Renewable energy facility” means any facility for the production of electrical energy that utilizes a renewable generation resource such as solar photovoltaic and solar thermal resources, wind resources, low-impact hydroelectric resources, geothermal resources, tidal and wave energy resources, recycling resources, hydrogen fuel derived from renewable resources, combined heat and power derived from renewable resources, and biomass resources.

H. Retail Electric Provider. “Retail Electric Provider” means an electrical utility as defined in Section 58-27-10 and also means other entities that provide retail electric service in South Carolina, but excluding electric cooperatives organized under the laws of a state other than South Carolina.

SUBARTICLE 2
APPLICATION FOR CERTIFICATE

Reg.

111-20. Application Required for Certificate.

111-21. Processing of Application.

111-22. Certificate.

111-20. Application Required for Certificate.

Any person, entity, business, or corporation desiring to operate in this State as a Lessor first shall file an application for a Certificate with ORS on forms to be furnished by ORS. All required information on the application forms must be correctly completed before filing of such application will be accepted.

111-21. Processing of Application.

Without good cause shown, any application for a Certificate submitted to ORS not in compliance with ORS's instructions, and any deficiencies thereof not corrected by the applicant within 90 days of submittal, may be rejected.

111-22. Certificate.

Upon ORS approval of the application, a numbered Certificate will be issued to the Lessor.

SUBARTICLE 3
OPERATIONS OF LESSORS

Reg.

111-30. Authority to Operate.

111-31. Operations of Lessors.

111-32. Requirements for Lease Agreements.

111-33. Requirements for Consumer Protection and Education.

111-34. Sale or Transfer of Certificate Prohibited.

111-30. Authority to Operate.

A. A Lessor may not market, sell, construct, or otherwise conduct business in the State of South Carolina prior to receiving a Certificate issued by ORS.

B. An entity that owns a renewable energy facility subject to any Lease Agreement entered into outside of Title 58, Chapter 27, Article 23 and these regulations shall be considered an "electrical utility" under Section 58-27-10 and therefore subject to applicable federal and state laws and regulations, and the rules and regulations of the Public Service Commission of South Carolina.

111-31. Operations of Lessors.

A. Lessors must conduct business in compliance with all applicable state and federal rules and regulations.

B. Lessors must meet all applicable safety, performance, interconnection, and reliability standards established by the commission or the retail electric provider, the National Electrical Code, the National Electrical Safety Code, the Institute of Electrical and Electronics Engineers, Underwriters Laboratories, the federal Energy Regulatory Commission, and any local governing authorities.

C. Lessors must install renewable energy facilities with personnel who meet or exceed all applicable state and local licensing requirements including the North American Board of Certified Energy Practitioners, Interstate Renewable Energy Council, and Underwriter's Laboratories- international Brotherhood of Electrical Workers certifications.

D. Lessors must require all personnel performing installation of renewable energy facilities to maintain bonding, liability insurance and worker's compensation insurance that meets applicable federal and state laws.

E. Lessors must require renewable energy facilities to meet the specifications of county and municipal permits.

F. Lessor Prohibitions.

1. Customer payments to a Lessor under a Lease Agreement shall be for the lease of a renewable energy facility only.

a. Lease payments must not be calculated upon metered output.

b. Energy generated by the Lessee's renewable energy facility must not be sold by the Lessee or Lessor to any customer of any retail electric provider.

2. Renewable energy facilities shall serve only one premises or residence, and shall not serve multiple Lessees or multiple premises or residences.

111-32. Requirements for Lease Agreements.

A. Lease Agreements must contain provisions as required by Title 37 and applicable regulations, Title 58, Chapter 27, Article 23 and these regulations.

B. In addition to the requirements contained in Title 37 and applicable regulations, the Lease Agreements shall include:

1. Prominent display of the Certificate number issued by ORS.

2. Appropriate disclosure forms as required by Title 37 and applicable regulations, with the following additions:

a. ORS phone number and e-mail address for Customer Complaints including the statement in bold 12-point font 'If you are unable to resolve your complaint with the Lessor, you have the right to contact the South Carolina Office of Regulatory Staff.'

b. A description of any warranties.

c. A copy of the warranty for renewable energy facilities.

d. A disclosure notifying the Lessee of the transferability of the obligations under the warranty to a subsequent Lessee.

e. A disclosure describing any warranty for the repair of any damage to the roof of the premises in connection with the installation or removal of renewable energy facilities.

f. A disclosure regarding whether the warranty or maintenance obligations related to renewable energy facilities may be sold or transferred to a third party.

g. A description of the renewable energy facility, including the make and model of the renewable energy facility's major components, and a guarantee concerning energy production output that the renewable energy facility will provide over the expected life of the Lease Agreement.

h. An explanation of any interest, installation fees, document preparation fees, service fees, escalation rates, cancellation fees, roof repair costs or other costs to be paid by the Customer.

i. In the event that a Lessor causes a financing statement to be filed pursuant to the Uniform Commercial Code-Secured Transactions, the Lessor, or any successor in interest to the Lessor, shall provide to the Lessee a copy of the filed financing statement within thirty calendar days of the filing.

j. A disclosure describing the transferability of the Lease Agreement and any conditions on transferring the Lease Agreement in connection with the Lessee selling his or her premises.

k. A description of any restrictions the Lease Agreement imposes on the modification or transfer of the premises to which the renewable energy facility serves.

l. A description of any state or federal tax incentives that are included in the calculation of Lease payments.

m. The total number of payments, including the interest, the payment frequency, the estimated amount of the payment expressed in dollars, and the payment due date over the leased term.

n. The estimated amount of the total payments due under the Lease Agreement, including, without limitation, any incentives that are included in the estimated lease payments.

o. A description of the billing and payment procedures.

p. A statement in bold 12-point font with substantially the following form and content: “NO employee or representative of [name of Lessor] is authorized to make any promise to you that is not contained in the Lease Agreement or disclosures concerning the cost savings, tax benefits, or government or utility incentives. You should not rely upon any promise or estimate that is not contained in this Lease Agreement or disclosures.”

111-33. Requirements for Consumer Protection and Education.

In addition to the requirements contained in Title 37 and applicable regulations, all Lessor marketing materials shall include:

A. The Certificate number issued by ORS;

B. The State Energy Office’s solar consumer information website address; and

C. ORS telephone number and e-mail address for Customer Complaints.

111-34. Sale or Transfer of Certificate Prohibited.

Transfer or sale of a Certificate to another entity is prohibited.

SUBARTICLE 4 RECORDS AND REPORTS

Reg.

111-40. Retention of Records.

111-41. Data to be Filed with ORS.

111-42. Inspections and Tests.

111-40. Retention of Records.

In addition to the recordkeeping requirements of Title 37 and applicable regulations, Lessor shall maintain the following records:

A. All documents provided to a potential customer prior to execution of a Lease Agreement, including but not limited to, marketing materials, diagrams of proposed renewable energy facility design, estimates of potential savings and benefits, information pertinent to the interconnecting utility, and estimates of cost and Lease Agreement payments.

B. All documents provided to, obtained from, or executed on behalf of Lessee including, but not limited to:

1. Affirmative acknowledgement and consent to receive documents electronically, and tracking information of paper or electronic transmittal of Lease Agreements to Lessees;

2. Change orders to existing Lease Agreements, transfers of Lease Agreements, and any other documents relating to Lessor business transactions with Lessee regarding the Lease Agreement; and

3. Records of retail electric provider interconnection applications, approvals, and communications to and from the retail electric provider on behalf of the Lessee to construct and safely interconnect the renewable energy facility.

C. All documentation and records of all customer complaints as will enable Lessor to review and analyze its procedures and actions, to include, but not limited to:

1. Name and address of the complainant, the date and character of the complaint;

2. All contact to and from the customer regarding the complaint; and

3. The adjustment or disposal made by Lessor to resolve the complaint.

D. Documentation and records of investigations by ORS including, but not limited to:

1. ORS investigation documents and Lessor responses;

2. Lessor or ORS actions as a result of any investigation; and

3. Name of Lessor representative(s) assisting ORS with the investigation.

111-41. Data to be Filed with ORS.

A. Lessors must file with ORS a Monthly Report of installed leased facility equipment as required by Title 58, Chapter 27, Article 23.

B. The Lessor shall annually, on or before April 1, on a form provided by ORS, file the name, title, address, and telephone number of the person who should be contacted in connection with:

1. General management duties;
2. Customer relations;
3. Engineering operations; and
4. Emergencies during non-office hours.

111-42. Inspections and Tests.

When requested by ORS, resulting from a Lessee complaint, Lessor or representative of Lessor, shall be present for any electric provider equipment testing to assist in determining correct recording of generation to, and consumption from, the electric grid.

SUBARTICLE 5
INVESTIGATION OF ALLEGED VIOLATIONS

Reg.

111-50. Violations.

111-51. Customer Complaints.

111-52. Investigation of Alleged Violations.

111-53. Notice of Violations.

111-54. Response to Notice of Violation.

111-55. Decision.

111-56. Request for Review of Decision.

111-57. Appeal of Agency Action.

111-58. Cooperation with Other Agencies.

111-50. Violations.

A. Violations. It shall be considered a violation of law for an entity to engage in any practice or action in marketing, or leasing renewable energy facilities contrary to the requirements set forth in Title 37 and applicable regulations, Title 58, Chapter 27 and applicable regulations, Title 58, Chapter 40, and these regulations.

B. ORS is authorized to enforce against any entity that owns a renewable energy facility installed on a customer's premise, for the customer's use, and leased to the customer, the requirements of Title 37 and applicable regulations, Title 58, Chapter 27, Article 23, Title 58, Chapter 40 as applicable, and these regulations.

111-51. Customer Complaints.

A. Complaints concerning the charges, practices, renewable energy facilities or service of a Lessor shall be investigated promptly, thoroughly, and professionally by Lessor.

B. If the customer is not satisfied with the Lessor's actions to remedy the complaint, the customer may request an investigation of the matter by ORS. The Lessor shall notify the Customer of their right to file a request for investigation at ORS.

111-52. Investigation of Alleged Violations.

A. ORS may investigate an alleged violation or refer the customer to the appropriate state agency to resolve the customer's complaint. ORS may notify the customer of its decision to investigate or refer the customer to the appropriate state agency.

B. ORS may request information and documents during the course of an investigation.

C. ORS will notify the Lessor at the commencement of an investigation. The Lessor must provide the following:

1. Acknowledgement of receipt of the complaint in writing within one (1) business day.
2. A response to ORS no less than five (5) business days from date of notification of the complaint.

D. Lessor must grant ORS access with reasonable notice to properties and areas, objects, and records during the course of the investigation.

E. An investigation will be deemed closed when ORS issues a Final Decision.

111-53. Notice of Violation.

ORS may issue a Notice of Violation. Such notice may present the results of ORS's investigation and any recommendations to remedy deficiencies and/or establish fines.

111-54. Response to Notice of Violation.

Lessor has twenty (20) days to respond to ORS Notice of Violation. The Response shall contain the Lessor's response to each finding presented in the Notice of Violation. It shall also contain the Lessor's response to ORS's recommendations for remediation or penalty. Such response must be provided under oath.

111-55. Decision.

A. ORS shall issue a decision on the Notice of Violation and Lessor's response in a timely manner. ORS may request additional information from the Lessor as necessary to render a decision.

B. ORS will provide a copy of the decision to the affected customer, the Lessor, and any other state agency or party involved in the investigation or remedy of the alleged violation. The decision will be considered the Final Decision after twenty-five (25) days from the date the decision is rendered by ORS, unless a timely Request for Review of Decision is filed pursuant to 111-56.

111-56. Request for Review of Decision.

A. Effect of Filing a Review. Filing a Request for Review of Decision shall not excuse or delay the Lessor's compliance with a Decision issued by ORS, unless specifically provided by ORS.

B. Submit Request. A Lessor may submit a Request for Review of Decision to ORS within twenty-five (25) days after the issuance of ORS's Decision.

C. Timeframe for Final Decision tolled. The timeline provided in 111-56 (B) will be tolled upon the filing of a Request for Review of Decision.

D. Review. During the Review of Decision, ORS may request additional information from the Lessor. ORS will issue its Final Decision on the matter in a timely manner.

E. Unless otherwise provided by law, no cause of action shall accrue in any court of competent jurisdiction to vacate or set aside any decision of ORS, either in whole or in part, unless a Request for Review of Decision and proof of service are filed with ORS, and a Final Decision has been issued disposing of the matter.

111-57. Appeal of Agency Action.

A Lessor may appeal an ORS Final Decision with the Administrative Law Court.

111-58. Cooperation with Other Agencies.

In addition to the powers and responsibilities relating to consumer protection, ORS will cooperate with and assist all federal, state, and local agencies performing consumer protection functions in carrying out their legal enforcement responsibilities for the protection of consumers.

SUBARTICLE 6 PENALTIES AND FINES

Reg.

111-60. Penalty.

111-61. Violation of Time Requirements.

111-62. Voiding of Lease Agreement.

111-63. Monetary Fines and Penalties.

111-64. Suspension of Operations.

111-65. Revocation of Certificate.

111-66. Cumulative Regulation.

111-60. Penalty.

Subsequent to the conclusion of an investigation by ORS and upon being found non-compliant with applicable regulations and statute, ORS may issue a penalty according to the provisions in these regulations.

111-61. Violations of Time Requirements.

ORS may specify the time within which a violation is required to be corrected. When a specific time is designated for correction, each day such violation exists after expiration of the time established by ORS shall be considered a subsequent violation.

111-62. Voiding of Lease Agreement.

ORS may void a Lease Agreement between a Lessor and Lessee when:

A. The Lease Agreement executed does not meet the requirements for Lessor certification in these regulations.

B. The Lessor fails to provide a copy of an executed Lease Agreement to the Lessee within the timeframes and methods as described in these Regulations.

C. The Lessor fails to cancel a Lease Agreement upon written request of a Lessee that occurs within the right of rescission period.

111-63. Monetary Fines and Penalties.

A. Administrative Fine. An entity may be assessed an administrative fine. The administrative fine may not exceed two thousand five hundred dollars per violation.

B. Civil Penalty levied against Lessors. An entity that is subject to S.C. Code Ann. § 58-27-2620(A) may be fined a civil penalty of not more than ten thousand dollars per occurrence of the following violations:

1. Operating without Certificate. An entity that solicits business as a Lessor of renewable energy facilities without a valid certificate issued by ORS, or that otherwise violates the terms of Chapter 58, Article 23;

2. Unfair or Deceptive Marketing Practices. A Lessor that engages in unfair or deceptive marketing practices in the leasing of renewable energy facilities.

C. Determination of Monetary Fine or Penalty. In determining the appropriate monetary Administrative Fine or Civil Penalty to be levied, ORS shall consider the following:

1. Timely response to an ORS request in accordance with applicable regulations and law; and

2. The number of violations, including repeat violations; specific conditions and their impact or potential impact on health and safety of persons as a result of the lease of the renewable energy generation facility; efforts to correct cited violations; behavior that would reflect negatively on an entity's character, such as illegal or illicit activities; history of compliance; any other pertinent conditions that may be applicable to statutes and regulations.

111-64. Suspension of Operations.

ORS may suspend the certificate and require the Lessor to immediately cease and desist from engaging in business as a Lessor in this State until the violation is resolved.

111-65. Revocation of Certificate.

ORS may petition the Administrative Law Court to revoke a Certificate issued pursuant to S.C. Code Ann. 58-27-2600 *et seq.*

111-66. Cumulative Regulation.

The provisions of Subarticle 6 of this regulation are cumulative of and in addition to any other action at law and any other action taken by ORS pursuant to Title 58.